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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 76

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA ET AL, *Petitioners*

v.

WILSON P. LOCKRIDGE

On Writ of Certiorari to the Supreme Court of the State of Idaho

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION AS AMICUS CURIAE

This brief *amicus* in support of the position of the respondent is filed by the National Right to Work Legal Defense and Education Foundation with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION

The National Right to Work Legal Defense and Education Foundation is an organization formed to protect the right to work, freedom of association, free speech and other liberties of the ordinary men and women who work for a living in this country where they are infringed by unconstitutional or other illegal practices in connection with compulsory union membership. It has found that too many of these people are discharged from their jobs without legal justification. They are seldom able without aid to assert their rights against a formidable combination of employer and union seeking to uphold an initial adverse determination.

They have no certain forum in unfair labor practice cases before the National Labor Relations Board (NLRB) which is heavily burdened in carrying out its major duty of promoting industrial peace by fostering a system of employee organization and collective bargaining and which not unnaturally has as its principal concern the general public interest rather than wrongs done to individual employees. The General Counsel of the Board has complete and unreviewable discretion to determine whether an unfair labor practice complaint shall or shall not be placed before the Board.[1] The remedies within the authority of the

[1] This Court so recognized in *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), where it said: "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. * * *. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. * * *.

NLRB often fall short of those available before the courts.

The individual employees usually prefer to go to courts in their vicinity rather than to resort to the NLRB. They not only find it more practical and convenient but they feel assured of an impartial hearing in the Courts.[2]

The National Right to Work Legal Defense and Education Foundation in seeking to aid these working people in response to their calls for assistance, believes that all avenues of relief should be kept open. It regards as contrary to the public interest the effort of the petitioner here and its supporters to close the doors

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Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's Miranda Fuel decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."

[2] This need of the individual employees for the right to resort to home-town courts was one of the bases for the dissent of Mr. Justice Douglas with whom Mr. Justice Clark concurred in *Association of Journeymen* v. *Borden*, 373 U.S. 690, 699-700 (1963): "Suits for damages by individual employees against the union or the employer fall in the category of Moore v. Illinois Cent. R. Co., 312 U.S. 630, 85 L.ed. 1089, 61 S.Ct. 754. As a matter of policy, there is much to be said for allowing the individual employee recourse to conventional litigation in his home-town tribunal for redress of grievances. Washington, D. C., and its administrative agencies—and even regional offices—are often distant and remote and expensive to reach. Under today's holding the member who has a rule dispute with his union may go without a remedy. * * *. When the basic dispute is between a union and an employer, any hiatus that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely."

of the courts, state and federal, to them and to other employees by overruling, directly or indirectly, or by circumscribing the scope of the decisions of this court in *Machinists* v. *Gonzales,* 356 US 617 (1967), *Vaca* v. *Sipes,* 386 US 171 (1967), and other cases permitting the courts to retain jurisdiction to afford relief to such employees in accordance with the plainly evident intent of Congress. To confine a complainant, particularly a rank and file employee, to a forum such as the NLRB, where he has no assurance of having his case decided on the merits, is unjust, and even harsh, and the extent of this practice should not be enlarged but restricted at least to its present limits.

STATEMENT

Wilson P. Lockridge, the Respondent, was a bus driver for Western Greyhound Lines (Greyhound), and a member of the Amalgamated Association and its Northwest Division (union) who are the petitioners here.

The union on or about November 2, 1959 alleging that Lockridge was not in good standing in its organization suspended him from membership, and then asked the company to discharge him. The company at once complied. (A 90-91).

The union's constitution stated "where a member allows his arrearage for dues, fines and assessments to run over the last day of the second month without payment * * *" he suspends himself from membership. Lockridge's dues for whose non-payment he was suspended were then in arrears for a little over one month, but not over the last day of the second month. (A 91, 92). His suspension—in truth it was expulsion —was therefore in violation of the constitution of the

union which under Idaho law constituted a contract between the union and its members.

The collective bargaining agreement between Greyhound and the union contained a compulsory union membership clause which required all employees to become and remain members of the union as a condition precedent to continued employment. (A 91).

The expulsion violated the collective bargaining agreement since it was made for non-membership in the union at a time when Lockridge was still a member of the union.

Lockridge and Day, another bus driver deprived of membership at the same time, were the only members of the local union who over the years had been expelled for arrearage in dues. In the other cases the arrearages had been waived, even where they exceeded sixty days, and were grounds for expulsion. Lockridge and Day had incurred the displeasure of union officials by discontinuing authorization for check-off of their dues. (A 51, 53, 56, 60-61). Lockridge sought reinstatement but without avail. (A 61, 62, 94, 95).

ARGUMENT

I

ASSUMPTION OF JURISDICTION BY IDAHO COURTS WAS IN CONFORMITY WITH DECISIONS OF THIS COURT

The petitioner here contends that the case is governed by the general rule of preemption set forth in *San Diego Building Trades Council* v. *Garmon,* 359 US 236 (1959). Under it where conduct is arguably either protected or prohibited by §§ 7 and 8 of the National Labor Relations Act as amended (Act) juris-

diction is preempted in favor of the Board to the exclusion of state action. Petitioner concedes that *Garmon* itself recognized two exceptions, one where the activity regulated is merely peripheral concern of the Act as in *Gonzales* and the other where the regulation touches interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction this Court could not infer that Congress had deprived the States of power to act as in *International Union UAA&IAW* v. *Russell*, 356 U.S. 634 (1958), and other cases involving union violence.

But these did not exhaust the qualifications that must be borne in mind in understanding the general rule of *Garmon*. It is not a rule expressly set forth in the Act, but one derived by implication from it. The court in dealing there with the legality of a picket line clearly exhibited its concern over protecting federal administrative jurisdiction over the central provisions of the Act, such as "the vital economic instruments of the strike and the picket line, and * * * the clash of the still unsettled claims between employers and labor unions." (359 U.S. at 241). Again, it repeated what it had previously said in *Garner* (346 U.S. at 488) and in *Gonzales* (356 U.S. 619) "the Labor Management Relations Act leaves much to the States." Obviously Congress has not assumed control of every aspect of labor relations, assigning jurisdiction to the NLRB either as a regulated or a protected activity.

Some idea regarding the areas left to the states is afforded by the decision of this Court in *Vaca* v. *Sipes*, 386 U.S. 181 (1967), where it enumerated eight exceptions to the preemption rule, three of them statutory and the other five inferred by the court itself from a

consideration of the intention of Congress in enacting various statutes in the labor area:

> "This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction: Sec. 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 USC § 187, expressly permits anyone injured by a violation of NLRA § 8(b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board: § 301 of that Act, 61 Stat. 156, 29 USC § 185, permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board (see Smith v. Evening News Assn., 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267); and NLRA § 14, as amended by Title VII § 701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 USC § 164(c), permits state agencies and courts to assume jurisdiction 'over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction' (compare Guss v. Utah Labor Board, 353 U.S. 1, 1 L. ed. 2d 601, 77 S. Ct. 598).
>
> In addition to these congressional exceptions, this court has refused to hold state remedies preempted 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.' San Diego Building Trades Council v. Garmon, 359 U.S., at 243-244, 3 L. ed. 2d at 781, 782. See, e. g. Linn v. Plant Guard

Workers, 383 U.S. 53, 16 L. ed. 2d 582, 86 S. Ct. 657 (libel); Automobile Workers v. Russell, 356 U.S. 634, 2 L. ed. 2d 1018, 78 S. Ct. 923 (violence); International Assn. of Machinists v. Gonzales, 356 U.S. 617, 2 L. ed. 2d 1018 (wrongful expulsion from union membership); Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 86 L. ed. 1154, 62 S. Ct. 820 (mass picketing). See also Hanna Mining Co. v. Marine Engineers Beneficial Assn., 382 U.S. 181, 16 L. ed. 2d 254, 86 S. Ct. 327.

While these exceptions in no way undermine the vitality of the preemption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." (386 U.S. 179-180).

In *Vaca* v. *Sipes* itself, this Court added an exception to the list consisting of a breach by a union of its duty of fair representation. (388 U.S. at 180-181).

Another exception not mentioned by the Court is of substantial significance in according an insight into congressional policy towards permitting the courts to assume jurisdiction in labor relations matters. Section 101 of Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411, contains a Bill of Rights of Members of Labor Organizations. Section 102, 29 USC 412, provides that any person whose rights secured in the title have been violated may bring a civil action in a District Court for relief including an injunction.

The AFL-CIO in its brief mentions a number of other exceptions: union organizational activity directed

at foreign flag seamen, *Incres S.S. Co.* v. *Maritime Workers,* 372 U.S. 24 (1963); the enforcement of state right to work laws, *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96 (1963); and the use of economic pressure in connection with representation disputes involving supervisors, *Hanna Mining Co.* v. *Marine Engineers Beneficial Assn.,* 382 U.S. 181 (1965). Even the list of exceptions as thus augmented doubtlessly falls short of being exhaustive.

II

DECISION BELOW CORRECTLY INVOKED EXCEPTION TO PREEMPTION RULE IN PERIPHERAL MATTERS SUCH AS EXPULSION FROM UNION AND RESULTING DAMAGES

The Supreme Court of Idaho correctly sustained the jurisdiction of the state courts over Lockridge's suit involving the peripheral matter exception to the *Garmon* rule—as one for reinstatement in the union and for damages for illegal expulsion.

The second amended complaint in praying for relief asked for damages and for "such other and further relief as to the Court may appear meet and equitable in the premises. (A 48, 99-100). The allegations set forth supported by the evidence at the trial clearly showed that Lockridge had over an extensive period following his unjustified expulsion from the union asked for reinstatement. (A 61, 62, 94, 95). They showed that he was entitled to this form of relief as well as to damages. The District Court at the second trial awarded reinstatement as well as damages, strictly in accordance with Rule 54(c) of the Idaho Rules of Civil Procedure which is identical with Rule 54(c) of the Federal Rules of Civil Procedure mandatorily requiring "every final judgment *shall* grant the relief to which the party in whose favor it is rendered

is entitled, even if the party has not demanded such relief in his pleadings." (Italics ours.)

The case before the Supreme Court of Idaho on the second appeal now before this court concerns the jurisdiction of a state court over an action by an expelled member for reinstatement in the union and for damages consequent upon the wrongful expulsion.

The suit is based upon the expulsion of Lockridge by the union in violation of the contract between the union and its members embodied in its constitution as well as in violation of the collective bargaining agreement between the union and the employer. These two contractual violations were the fountain head of the entire injuries suffered by Lockridge. But for his unjustified expulsion none of the other consequences would have followed. The union's demand upon the employer for the discharge of Lockridge in violation of the collective bargaining agreement was the basis for the damages claimed and awarded. Hence the court below found the case to be one focusing on purely internal matters of the defendant union, the employer having been dropped as a defendant. (A 49, 89). The court looked not alone at the matter of contract violations but at the conduct of the parties taken as a whole, (A 105), although as the Solicitor General and the Board concede the NLRB as well as a court must interpret the constitution of the union and the union shop clause of the collective bargaining agreement to decide this type of a case. (Amicus Curiae brief, p. 18)

The court below therefore was justified in relying upon *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 617 (1958). It found that case controlling in favor of state jurisdiction and there is no sufficient rea-

son for doubting the soundness of this conclusion. Gonzales sought relief in a state court in California for expulsion from membership in the union in violation of its constitution and for resulting damages. The judgment was for reinstatement and damages for lost wages as well as for physical and mental suffering (365 U.S. at 618). Most of the damages were for lost wages arising from the refusal of the union hiring hall because of his expulsion from the union to refer him for employment, (142 C.A. 2d at 221-2), which was undoubtedly related to employment and was at least arguably an unfair labor practice. (See 356 U.S. 619-620).

After noting the generally prevailing rule followed in California that the constitution of a labor organization constitutes a contract between it and its members (356 U.S. at 618-19) this court in an opinion by Mr. Justice Frankfurter went on to uphold the right of state courts to entertain jurisdiction to order the reinstatement of union membership:

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that "this paragraph shall not impair the right to a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . . ." 61 Stat. 141, 29 USC § 158(b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for "retention of membership therein." Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union mem-

> bership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See United Constr. Workers v. Laburnum Const. Corp. 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 833." (356 U.S. at 620).

This Court also upheld the right of the California court to award damages on grounds which are equally applicable here:

> "The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." (356 U.S. at 621).

There is one really significant difference between *Lockridge* and *Gonzales.* Here, there was a union shop clause in the collective bargaining agreement which the petitioner caused to be violated. There was no such agreement in *Gonzales,* although the plaintiff there experienced the same difficulty in getting a job after expulsion from the union as the plaintiff here, his trouble however, arising from a different source—the refusal of the union hiring hall to refer a non-union member to any employer. But the difference is in favor of state court jurisdiction in the case at bar because there is no federal preemption in favor of the union shop.

Petitioner is seriously in error in contending that the union shop clause is manifestly a vital tool of labor and one which Congress obviously regarded as at the heart of the Act. (Petitioner's brief p. 20, 50-51).

If there is any comprehensive regulation of the union shop in the Act, it is found in Section 8(a)(3)—and principally in its two provisos. Section 8 defines unfair labor practices by an employer. The first clause of Section 8(a)(3) defines one such unfair labor practice as "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This is immediately followed by the first proviso, which states: *"Provided,* that nothing in this Act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization * * * *" for a modified union shop. This disclaimer leaves the matter up to the states. To remove any possible doubt on this point, Congress in the Labor Management Relations Act added § 14 (b) which reads:

> "Sec. 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by State or territorial laws."

This Court has held that Sections 8(a)(3) and 14(b) constitute a disclaimer of federal preemption in the field of the union shop. *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U.S. 301 (1949). In issue there was the discharge of an employee for failure to pay union dues as required by a union shop agreement when the

agreement had not been approved by two-thirds of the employees in a referendum required by a state statute. The defense was that the state statute had been preempted by Section 8(3) of the original National Labor Relations Act (the Wagner Act) or by Sections 8(a)(3) and 14(b) of the Labor Management Relations Act. This Court in an opinion by Mr. Justice Frankfurter held that there had been no preemption under either federal statute and hence the state statute was effective and the discharge unlawful. The Court first considered the contention that Section 8(3) of the Wagner Act swept aside the state law and held that it did not because it was merely a disclaimer of a national policy hostile to compulsory union membership. The Court said at page 306-7:

> "The contention that § 10(a) of the Wagner Act swept aside State law respecting the union shop must therefore be rejected. If any provision of the Act had that effect, it could only have been § 8(3), which explicitly deals with membership in a union as a condition of employment. We now turn to consideration of that section.
>
> Section 8(3) provides that it shall be an unfair labor practice for an employer
>
> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act . . ., or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit * * *."

> It is argued, therefore, that a State cannot forbid what § 8(3) affirmatively permits. The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of the words "nothing in this Act . . . or in any other statute of the United States," and it is confirmed by the legislative history."

The Court then proceeded to consider the further contention that Sections 8(a)(3) and 14(b) of the Labor Management Relations Act which had been passed after the discharge of the plaintiff but before the case was decided preempted the field. The Court held that they did not, saying at Pages 313-14:

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) * * * was included to forestall the inference that federal policy was to be exclusive. It reads:
>
> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."
>
> It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that

> the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, which under the circumstances "is prohibited" by the State, the legislative history of the section would dispel it."

In *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 104 (1963), this Court in holding that a state may enforce its statutory prohibition against an agency shop clause in a collective bargaining agreement followed its previous decision in *Algoma* saying:

> "The court in Algoma Plywood Co. v. Wisconsin Board, 336 U.S. 301, 314, 93 L. Ed. 691, 702, 69 S. Ct. 584, stated that "§ 14(b) was included to forestall the inference that federal policy was to be exclusive" on this matter of union-security agreements. In that case a state agency issued a cease-and-desist order against an employer from giving effect to a maintenance of membership agreement and ordered an employee reinstated and made whole for any loss of pay suffered. It was urged that since § 10(a) of the Wagner Act gives the Federal Board "exclusive" power to prevent "any unfair labor practice," state power in the federal commerce field was displaced. Id. 336 U.S. at 395, 93 L. Ed. at 698. State power, however, was held to exist alongside of federal power because of the special legislative history of the union-security provisions of the Act."

Some nineteen states have prohibited the union shop. Idaho has not. But it could do so at any time. Congress has given its express permission. Whether a union shop is to be permitted in Idaho is left to state law, although what is permitted there may not overstep the limits set in the two provisos to Section 8(a)(3) of the Labor Management Relations Act. The regulatory control is thus divided between state and

federal jurisdictions instead of being entirely preempted by the federal government to the exclusion of the states. Congress has by express statutory provisions disclaimed the idea of assuming exclusive control or of vesting it in the National Labor Relations Board.

No question is presented here concerning the construction of any of those statutory provisions or the legality under them of the union shop clause of the collective agreement. The question presented is one of the proper interpretation of that agreement—whether an employee who continues to be a member of the union under the terms of its constitution may be discharged for non-membership in the union—a question so simple that it answers itself. It could not conceivably be regarded as a vital problem of labor relations or going to the heart of national labor policy. But even if we may not consider the simple question actually involved and must address ourselves to the union shop arrangement in some broader context we still cannot regard it as the petitioner contends at the very heart of the national labor policy or so extensively preempted by Congress that the state court may not without contravening the national labor policy interpret a simple contract clause going little further than to say that any employee shall be discharged who does not maintain his membership in the union.

It follows that there is less reason to regard *Lockridge* as preempted than *Gonzales* where the hiring hall that brought about most of the damages suffered by the plaintiff cannot be said to be left to the states to the same extent as the union shop.

It is clear that the case at bar comes under the peripheral area exception to the rule of preemption in *Garmon*.

There is every reason to believe that *Gonzales* still represents a valid exception to the preemption rule in *Garmon.*

Not only did this Court twice cite *Gonzales* with approval in its decision in *Garmon,* but in later cases it has referred to it with approval. Two of these cases were decided in 1967, subsequently to *Association of Journeymen* v. *Borden,* 373 U.S. 690 (1963), and *Ironworkers Union* v. *Perko,* 373 U.S. 701 (1963), the cases relied upon by petitioner.

In *Vaca* v. *Sipes,* 386 U.S. 171, 180 (1967), the court in enumerating non-statutory exceptions that it has recognized to the rule in *Garmon* listed matters of "a merely peripheral concern of the Labor Management Relations Act" and cited *Gonzales* as exemplifying one of them. (386 U.S. at 180).

In *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967) this court referred with approval to the body of law establishing standards of fairness in the enforcement of union discipline that has grown up around the contract doctrine of *Gonzales,* saying:

> "In Machinists v. Gonzales, 356 U.S. 617, 618, 2 L. ed. 2d 1018, 1020, 78 S. Ct. 923, we recognized that "[t]his contractual conception of the relation between a member of his union widely prevails in this country. * * *".
>
> Although State Courts were reluctant to intervene in internal union affairs, a body of law establishing standards of fairness in the enforcement of union discipline grew up around this contract doctrine. See Parks v. Electrical Workers, 314 F. 2d 886, 902-3."

Since *Gonzales* represents the law as it stands today, and *Lockridge* comes within the principles there established, the Supreme Court of Idaho was right in regarding it as controlling here.

III

THIS CASE IS DISTINGUISHABLE FROM BORDEN AND PERKO

This case as the Idaho court held is clearly distinguishable from *Association of Journeymen* v. *Borden,* 373 U.S. 690 (1963), and *Ironworkers Union* v. *Perko,* 373 U.S. 701 (1963).

The main reliance of the petitioner's argument seems to be that *Gonzales* has been overruled by *Borden* and *Perko.* In *Borden,* (373 U.S. at 697), and *Perko,* (373 U.S. at 705), however, this court held that *Gonzales* was not in point because it is distinguishable. In neither case did the action involve reinstatement of an expelled union member, or conduct on the periphery of labor relations.

In *Borden* the controversy was over the refusal of the union to refer the plaintiff, one of its members, for work on a particular construction project, where he had sought and obtained a promise of employment in violation of a union rule. This Court held that the state court was without jurisdiction because the suit was focused principally if not entirely on the union's actions with respect to Borden's efforts to obtain employment and involved conduct arguably subject to the Board's jurisdiction.

It said it was of no significance that the complaint against the union sounded in contract as well as in tort since it is the conduct of the parties rather than the label affixed to the cause of action that is deter-

minative of the relationship between state and federal jurisdiction.

In the case at bar, in a complaint with two counts, one in contract and one in tort, before a state court the focus was on the two contracts and their interpretation and the relief granted was for violation of the contracts. If the complaint had been of an unfair labor practice before the National Labor Relations Board the focus would have been on the same things. Before the Board the decisive issue would have been whether the union had violated the contracts, just as that had actually been the decisive issue on the merits before the Idaho courts. There was no dispute over interpretation of the statute, no technical problem of labor relations, no call for expertise in that field. Hence the case at bar is fundamentally different and distinguishable from *Borden* just as it involves the same basic issues as *Gonzales*.

The distinction between *Gonzales* and *Perko* is even more evident. The plaintiff there brought suit against the ironworkers union of which he was a member and certain of its officers seking damages under state common law for a conspiracy to deprive him of the right to continue to work as a foreman. A rule of his union prohibited any mmeber under penalty of a fine from leaving the Ironworkers to go in as a Boilermaker or assist the other union in any way. The union claimed Perko had violated this rule, when as a superintendent he assigned to Boilermakers work over which the Ironworkers claimed jurisdiction. It found him guilty, and informed the employer that its members would no longer take orders from him because he had been educating Boilermakers in work belonging to Ironworkers. The company laid him off due to his

dispute and he thereafter could not obtain employment either as superintendent or as a foreman, but only as an ordinary iron worker.

This Court held that for the reasons set forth in *Borden* the rationale of *Gonzales* did not support state jurisdiction. The crux of the action it said concerned alleged interference with existing or prospective employment relations and was not directed to internal union matters. (373 U.S. at 705). It characterized the case as one presenting "difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole' ". (373 U.S. at 706). Thus *Perko* like *Borden* while a small case raised complex issues of labor relations. Both cases are quite unlike the peripheral case of simple contract interpretation found in *Lockridge,* where the issues of interpretation would be controlling before the Board as they were before the Idaho courts.

IV

IDAHO COURT HAD JURISDICTION UNDER SECOND EXCEPTION TO PREEMPTION RULE—A SUIT FOR VIOLATION OF SECTION 301 OF NLRA

Although they did not so hold, the Idaho courts had jurisdiction of this case under the facts set forth in the complaint under two further exceptions to the preemption rule of *Garmon.*

They had jurisdiction under Section 301 of the Labor-Management Relations Act, 29 USC 185, which expressly gives jurisdiction to any district court of the United States in suits for violation of contracts between an employer and a labor organization. A state court has concurrent jurisdiction.

This Court held in *Dowd Box* v. *Courtney*, 368 U.S. 502 (1962) that a state court has concurrent jurisdiction over suits under Section 301 under the principle that an Act of Congress conferring jurisdiction on a federal district court is also subject to enforcement in a state court unless the statute expressly reserves exclusive jurisdiction to the federal court, as Section 301 does not. The court also pointed out that when the Labor Management Relations Act was under consideration in Congress the bill passed by the Senate contained a provision making a breach of a collective bargaining agreement an unfair labor practice subject to the jurisdiction of the NLRB, as well as a provision conferring jurisdiction upon the federal courts over such suits. In conference, however, between the two Houses it was decided to make the suits cognizable in the courts; the statute as passed so provided. (368 U.S. at 510, 511).

Here the collective bargaining agreement was violated by the discharge of Lockridge for non-membership in the union when he was in fact at the time a member of the organization, and this violation was the basis for the award of damages.

The Petitioner goes even further contending that this was "certainly an employment relation case because all of the relief except restoration to union membership 'necessarily had to turn on this court's interpretation of § 3 of the collective bargaining contract between the defendant union and Greyhound'". (Petitioner's brief p. 47), and that the crux (Petitioner's brief, p. 16) or gravamen (Petitioner's brief, p. 24) of this case is the allegation of a discharge by Greyhound in violation of the collective agreement. Petitioner cannot have it both ways—cannot claim

that the crux of the case is this violation of the collective bargaining agreement and yet deny the suit is within the jurisdiction of the court under Section 301 for relief from such a violation. Such a suit may be maintained regardless of the subsidiary issues raised and certainly whether or not employment relationships are involved since such relationships are the principal subject matter of collective agreements.

In *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962), an employee of a newspaper individually and as assignee of other members of a union brought suit in a Michigan court asserting violation of a collective bargaining agreement provision forbidding discrimination against any employee because of union activity. The discrimination focused on employment during a strike—allowing non-union employees to report for work and paying them even though there was no work available during the strike but denying similar privileges to the union plaintiffs. The state courts refused to entertain the suit holding that the discrimination was an unfair labor practice within the exclusive jurisdiction of the NLRB under the preemption rule of *Garmon*. This court reversed holding that the action arose under § 301 and was not preempted under the *Garmon* rule, saying in part:

> "In Lucas Flour as well as in Atkinson the Court expressly refused to apply the preemption doctrine of the Garmon case; and we likewise reject that doctrine here where the alleged conduct of the employee, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301."

The Court also overruled a contention that Section 301 applies to suits brought by unions but not to suits by employees (371 U.S. at 200-201). It is significant that the NLRB in an *amicus curiae* brief filed there by the Solicitor General asserted that the ousting of courts of jurisdiction under Section 301 in the case would not only fail to promote but would actually obstruct the purposes of the Labor Management Relations Act. That would seem to be as true here as there in spite of the NLRB's *amicus* brief here seeking to oust the jurisdiction of the Idaho court.

Smith v. *Evening News Assn.* was brought against an employer. *Humphrey* v. *Moore,* 375 U.S. 335, likewise a suit brought in a state court under Section 301 for violation of a collective bargaining agreement, was a class action brought against the union and the employer by an employee of a motor carrier for an injunction to prevent enforcement of an award of a joint employer-employee committee created under a collective labor contract to settle a controversy with respect to seniority of employees following the absorption by the employer of another motor carrier. The award by reducing his seniority would have caused the plaintiff to lose his [illegible] and thus, of course, directly involved employment rights. This Court held that the complaint stated a cause of action within the jurisdiction of the state court whether or not it involved an unfair labor practice under the Act, citing with approval its previous decision in *Smith* v. *Evening News, supra:*

> "For these reasons, this action is one arising under Section 301 of the Labor Management Relations Act and is a case controlled by Federal Law, Textile Workers Union v. Lincoln Mills, 353 U.S. 448,

1 L. ed. 2d 972, 77 S. Ct. 912, even though brought in a state court. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 7 L. ed. 2d 593. 82 S. Ct. 571; Smith v. Evening News Assn., 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267. Even if it is, or arguably may be an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith v. Evening News Assn., supra subject, of course, to the applicable federal Law." (375 U.S. at 343-4).

In *Vaca* v. *Sipes,* 386 U.S. 171, 180 (1967), this court again cited with approval the decision in *Smith* v. *Evening News Assn., supra,* on the right of an employee to sue under Sec. 301 for unlawful discharge in violation of a collective bargaining agreement:

> "If an employee is discharged without cause, either the union or the employee may sue the employer under LMRA § 301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. Garmon and like cases have no application to § 301 suits. Smith v. Evening News Assn., 371 U.S. 195, 9 L. ed. 2d 246, 83 S. Ct. 267."

This court has said that Section 301 is to be liberally construed and is not to be given "a narrow reading" to limit the kind of cases that may be brought under it. *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 456-7 (1957); *Smith* v. *Evening News Assn.,* 371 U.S. 195, 199 (1962).

Clearly enough the state court in the case at bar had jurisdiction under Section 301 whether or not the

crux or the gravamen of the action was the unlawful discharge or whether the conduct of the defendant also constituted an unfair labor practice within the exclusive jurisdiction of the NLRB.

V

THIS CASE COMES WITHIN THIRD EXCEPTION TO PREEMPTION RULE—SUIT FOR BREACH OF UNION'S DUTY OF FAIR REPRESENTATION

When the union expelled Lockridge from membership without justification and when it notified the employer that Lockridge was no longer a member and demanded that he be discharged from his employment it breached its duty of fair representation.

The expulsion from the union was plainly in violation of the provisions of the union constitution. The flagrant discrimination against Lockridge by expelling him for a short term delinquency in dues was not only unjustified under the provisions of the constitution but it was also contrary to the custom and practice of the union local in granting leniency for delinquency in dues payments even where unlike here they were long enough to constitute valid grounds for expulsion (A 51-53, 56, 60, 61). The statement that he was no longer a member was contrary to fact—and the request to Greyhound that he be removed from employment on the basis of this false and misleading representation was also a breach of the duty of fair representation.

The petitioner was the exclusive bargaining agent for Lockridge and the other bus drivers under Section 9 of the Act as well as under the provisions of the collective bargaining agreement. The employees could not avail themselves of other representation, nor even represent themselves. They were bound by the acts of

petitioner within the scope of its authority. Under these circumstances the law imposed on petitioner a duty of fair representation.

The duty of fair representation was first established in cases arising under the Railway Labor Act in which employees who had been discriminated against on account of race were held to have the right to sue first the union and then the employer to secure removal of the discrimination. *Steele* v. *Louisville & N R Co.,* 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive F & E,* 323 U.S. 210 (1944); *Brotherhood of Trainmen* v. *Howard,* 343 U.S. 768 (1952); *Conley* v. *Gibson,* 355 U.S. 41 (1957); *Glover* v. *St. Louis-San Francisco R. Co.,* 393 U.S. 324 (1969); *Czosek* v. *O'Mara,* 397 U.S. 25, 25 L. ed. 2d 21 (1970). The duty has subsequently been extended to embrace cases arising under the National Labor Relations Act. *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1952).

In *Vaca* v. *Sipes, supra,* the court described this duty of fair representation as follows at page 177:

> "It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see Ford Motor Co. v. Huffman, 345 U.S. 330, 97 L. ed. 1048, 73 S. Ct. 681; Syres v. Oil Workers International Union, 350 U.S. 892, 100 L. ed. 785, 76 S. Ct. 152, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 U.S. 335, 11 L. ed. 2d 370, 84 S. Ct. 363. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives

under the Railway Labor Act, see Steele v. Louisville & N. R. Co., 323 U.S. 192, 89 L. ed. 173, 65 S. Ct. 226; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 89 L. ed. 187, 65 S. Ct. 235, and was soon extended to unions certified under the NLRA, see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. at 342, 11 L. ed. 2d at 377. It is obvious that Owens' complaint alleged a breach by the union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. E. G. Ford Motor Co. v. Huffman, supra."

The duty is co-extensive with the authority of the union as the collective bargaining agent. It extends to all of its activities within the scope of this authority. The extent of the duty was outlined by this Court in *Conley* v. *Gibson, supra:*

"The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end as the respondents seem to contend with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things it involves day to day adjustments in the contract and other working rules, resolutions of new problems not covered by existing agreements and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face, yet adminis-

> tered in such a way with the active or tacit consent of the union as to be flagrantly discriminatory against some members of the bargaining unit." (355 U.S. at 46).

The scope of the duty was described in *Humphrey* v. *Moore,* 375 U.S. 335, 342 (1964), as consisting of "the negotiation and administration of a collective bargaining contract. In *Vaca* v. *Sipes, supra,* the duty was referred to in much the same way as consisting in "collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement." (386 U.S. at 177).

In *Vaca* v. *Sipes, supra,* this Court held that an allegation by an employee that he had been discharged from his job in violation of a collective bargaining agreement and that the union had arbitrarily refused to take his grievance to arbitration also set forth a violation of the duty of fair representation which was likewise cognizable by a court, even though the facts alleged constituted an unfair labor practice. In so holding, this Court said in part:

> "A primary justification for the preemptive doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in Steele and its progeny and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the LMRA. Moreover, when the Board declared in Miranda Fuel that a union's breach of its duty of fair representation would

henceforth be treated as an unfair labor practice the Board adopted and applied the doctrine as it had been developed by the Federal Courts." (386 at 180, 181).

Conley v. *Gibson, supra,* 355 U.S. 41 (1957), *Glover* v. *St. Louis-San Francisco R. Co.,* 393 U.S. 324 (1969), and *Czosek* v. *O'Mara,* 397 U.S. 25, 25 L. ed. 2d 21 (1970), were all concerned not with the negotiation but as here with the administration of a collective bargaining agreement.

It follows that the state court was justified by this third exception to the preemption rule of *Garmon* in entertaining jurisdiction of Lockridge's complaint, even though the facts of the case might also constitute a sufficient basis for a charge of unfair labor practice under the Board's jurisdiction.

VI

THE COMBINATION OF THE THREE EXCEPTIONS GIVES ADDED STRENGTH TO THE HOLDING THAT THE STATE COURT HAD JURISDICTION

Any one of the three exceptions to the preemption rule of *Garmon* just reviewed would be sufficient to sustain the jurisdiction of the state court over the present action against the contention that since the facts disclose one or more unfair labor practices the case is within the exclusive jurisdiction of the NLRB. But the case in favor of state court jurisdiction here is greatly strengthened by the presence together of all three of the exceptions, and with each lending strength to the other.

The *Gonzales* exception it is true is limited to peripheral matters such as a suit by a union member for reinstatement in a labor organization and for damages caused by his expulsion. But the exception covering

cases brought under Section 301 of the Act for violation of a collective bargaining agreement is by no means limited to such purely peripheral matters. Suits brought under this exception ordinarily embrace controversies dealing with employment rights. *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Smith* v. *Evening News Assn.,* 371 U.S. 195 (1962). Similarly, suits brought for breach by a union of its duty of fair representation cover a wide range of employment problems. *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1952); *Czosek* v. *O'Mara,* 397 U.S. 25, 25 L. ed. 2d 21 (1970); *Glover* v. *St. Louis-San Francisco R. Co.,* 393 U.S. 324 (1969); *Conley* v. *Gibson,* 355 U.S. 41 (1957); *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 192 (1944).

Accordingly, there is very little point to the insistent argument of petitioner and its amici that the state court is deprived of jurisdiction because the crux of this case concerns a violation of the collective bargaining agreement in its provisions dealing with employment rights. This is no bar to an action like the present one for relief under Section 301 of the Act and for breach of the duty of fair representation. The proceeding here is the clearest kind of a case for sustaining the jurisdiction of the state courts below.

CONCLUSION

The judgment of the Supreme Court of Idaho should be affirmed.

Respectfully submitted,

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